

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Johnson Enterprises, Inc.)	File No. EB-03-KC-001
Licensee of KLEY(AM))	
Wellington, Kansas)	NAL/Acct. No. 200332560016
)	
)	FRN 0006-1509-65
)	

FORFEITURE ORDER

Adopted: July 28, 2004

Released: July 30, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of three thousand two hundred dollars (\$3,200), to Johnson Enterprises, Inc. (“Johnson”), licensee of Station KLEY(AM), Wellington, Kansas, for repeated violation of Section 73.1745(a) of the Commission’s Rules (“Rules”).¹ The noted violation involves Johnson’s operation of the station at a power of more than 1 watt during nighttime hours from January 10-13, 2003, in contravention of the terms of its station authorization.

II. BACKGROUND

2. On January 6, 2003, the Commission’s Enforcement Bureau Kansas City Office (“Kansas City Office”) received a confidential complaint that Station KLEY(AM) had been operating at night with full daytime power while carrying Nebraska University football games and other local sporting events. The complaint stated the station appeared to be attempting to cover Wichita, Kansas with its broadcast signal. Station KLEY(AM)’s license authorizes operation with 250 watts of power during daytime and 1 watt at night. Wichita is approximately 30 miles from the KLEY location in Wellington and is outside of the station’s nighttime broadcast coverage area when operating with the authorized output power of 1 watt.

3. In response to this complaint, an agent of the Kansas City Office monitored the signal strength level of the station on January 10-21, 2003. The monitoring showed that Station KLEY(AM) remained at daytime power during nighttime hours on January 10-13, 2003.

4. On January 30, 2003, the agent inspected the station, accompanied by the station’s owner and general manager, Gordon Johnson, and chief operator, Vernon Napier. According to the agent’s notes taken during the inspection, Mr. Johnson made the following statements: 1) that Johnson had entered into a written contract with the Kansas Cornhusker Club of Wichita, Kansas to carry Nebraska

¹47 C.F.R. § 73.1745(a).

University football games on KLEY “in their entirety” during the 2002 football season; 2) that Station KLEY(AM) aired two nighttime Nebraska football games, one against Arizona State and the other against Penn State, at the full daytime power level of 250 watts; 3) that the station utilized an automatic timer to switch the transmitter between daytime and nighttime power levels and that on August 24 and September 14, 2002 the station operator used the manual override to operate the transmitter with daytime power during nighttime hours; and 4) that he was unaware of the station’s daytime power operation during nighttime hours on January 10-13, 2003.

5. On April 3, 2003, the Kansas City Office issued a *Notice of Apparent Liability for Forfeiture* to Johnson in the amount of six thousand dollars (\$6,000) for the apparent willful and repeated violation of Section 73.1745(a) of the Rules.² On April 30, 2003, Johnson filed a response to the *NAL* seeking a cancellation or reduction of the proposed forfeiture. Johnson admits that the station experienced trouble with its low power transmitter from the end of December 2002 to the early part of January 2003. It claims that an independent engineer made several trips to the station during this time to repair the transmitter. Johnson categorically denies that Mr. Johnson stated that KLEY(AM) operated at full power to broadcast the Nebraska football games against Arizona State and Penn State. Finally, Johnson argues the forfeiture should be reduced or canceled because it does not have a prior history of violations and is unable to pay the proposed amount.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ Section 1.80 of the Rules,⁴ and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”). In examining Johnson’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁵

7. Section 73.1745(a) states that no broadcast station shall operate at times, or with modes or power, other than those specified and made part of the license.⁶ Station KLEY(AM)’s authorization specifies that the station may operate from local sunrise to local sunset with a power of 250 watts and from local sunset to local sunrise with a power of 1 watt. Johnson acknowledges that the station continued to air programming even though its transmitter was not operating properly from December 2002 to January 2003. Johnson does not deny that the station operated overpower on the evenings of January 10-13, 2003. We find that Johnson repeatedly⁷ violated Section 73.1745(a) of the Rules by

²*Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332560016 (Enf. Bur., Kansas City Office, April 3, 2003) (“*NAL*”).

³47 U.S.C. § 503(b).

⁴47 C.F.R. § 1.80.

⁵47 U.S.C. § 503(b)(2)(D).

⁶47 C.F.R. § 73.1745(a).

⁷As provided by 47 U.S.C. § 312(f)(2), a continuous violation is “repeated” if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section (continued....)

operating Station KLEY(AM) at daytime power levels during nighttime hours on January 10, 11, 12, and 13, 2003. Because we find that Johnson repeatedly violated Section 73.1745(a), we need not address whether the violation was willful.

8. We also conclude that the forfeiture should be reduced to \$4,000, the base forfeiture amount for overpower operation. The Kansas City Office raised the proposed forfeiture above the base forfeiture amount based on Mr. Johnson's contemporaneous admission that an employee intentionally bypassed the transmitter's automatic timer on at least two occasions to broadcast nighttime Nebraska football games. We note that Johnson later recanted these statements. As our finding herein that Johnson repeatedly violated Section 73.1745(a) on January 10-13, 2003 does not rely upon these statements by Mr. Johnson, we find a reduction in the proposed forfeiture amount from \$6,000 to \$4,000 is appropriate.

9. Johnson asserts the forfeiture should be cancelled or reduced because it does not have the financial ability to pay the proposed forfeiture. The Commission has determined that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.⁸ After reviewing the tax returns provided by Johnson, we disagree and conclude that Johnson is able financially to pay the proposed forfeiture.

10. Finally, Johnson asserts the forfeiture should be cancelled or reduced because it has not received a Notice of Forfeiture prior to this *NAL*. After considering Johnson's past history of compliance, we conclude that a further reduction of the forfeiture amount to \$3,200 is appropriate.

11. We have examined Johnson's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Johnson willfully and repeatedly violated Section 73.1745(a) of the Rules and reduce the forfeiture amount to \$3,200 based on Johnson's past history of overall compliance with the Rules.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,⁹ Johnson Enterprises, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of three thousand two hundred dollars (\$3,200) for repeatedly violating Section 73.1745(a) of the Rules.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁰ Payment shall be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note NAL/Acct. No. 200332560016, and FRN0006-1509-65. Requests for full payment under an installment plan should be sent to: Chief, Revenue and

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503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

⁸See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992).

⁹47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁰47 U.S.C. § 504(a).

Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹¹

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to E. Gordon Johnson, President of Johnson Enterprises, Inc., P.O. Box 249, 338 S. KLEY Drive, Wellington, Kansas 67152.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹¹See 47 C.F.R. § 1.1914.